

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**WILLIAM R. IMLER, AS
SUCCESSOR TRUSTEE OF THE
VIRGINIA L. IMLER TRUST**

APPELLANT,

**v.
FIRST BANK OF MISSOURI**

RESPONDENT.

DOCKET NUMBER WD77362

DATE: November 25, 2014

Appeal From:

Clay County Circuit Court
The Honorable Janet L. Sutton, Judge

Appellate Judges:

Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Attorneys:

Benjamin S. Creedy, St. Joseph, MO, for appellant.

Justin M. Nichols, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Three: Karen King Mitchell, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

William R. Imler, as successor trustee of the Virginia L. Imler Trust, appeals the grant of summary judgment in favor of First Bank of Missouri and its employee Salvator DiMiceli in connection with the Imler Trust's lawsuit which sought damages following First Bank's foreclosure of property owned in part by the Imler Trust. The foreclosure followed the extension of a loan to American Equities, the co-owner of the mortgaged property. The Defendants have not established a right to summary judgment in their favor as a matter of law.

REVERSE AND REMAND

1. The Defendants did not establish that they were entitled to summary judgment as a matter of law on the defense of failure to assert compulsory counterclaims. The Imler Trust was not obligated to assert the claims now asserted against the Defendants in the earlier foreclosure lawsuit. Even if the current claims qualify as compulsory counterclaims, a question we need not decide, compulsory counterclaims need not be raised in an *in rem* action. The foreclosure lawsuit sought and secured only an *in rem* judgment against the Imler Trust.

2. Even if the method of service used in the foreclosure lawsuit was sufficient to establish personal jurisdiction over the Imler Trust, the *in rem* nature of the foreclosure lawsuit afforded the Imler Trust the option to assert compulsory counterclaims in that action or in a later independent action.

3. Defendants did not establish the threshold essential to a judicial estoppel defense--that the Imler Trust's assertions in the present lawsuit here are "clearly inconsistent" with similar assertions against American Equities in an earlier lawsuit--given Defendants' acknowledgement that the Imler Trust could be asserting that both the Defendants and American Equities misrepresented the purpose for the loan to American Equities.

4. The Defendants' alternative argument that the Imler Trust improvidently split its cause of action by suing American Equities in a separate lawsuit is without merit. The splitting cause of action defense does not apply as a matter of law to separate lawsuits involving different defendants.

5. Language in a trust certificate signed by the Imler Trust at the time it executed a mortgage in favor of First Bank verifying that the trustee had the authority to bind the Imler Trust does not negate, as a matter of law, the Imler Trust's ability to establish reliance on the Defendants' alleged representations about the purpose of the loan to American Equities. Whether the trustee had the power to mortgage the property on behalf of the Imler Trust whatever the purpose for the loan is an inquiry quite independent from whether the trustee exercised that power in reliance on representations about the purpose for the loan.

6. Similarly, the trust certificate's verification that the trustee knew the purpose for the loan and believed the Imler Trust would benefit from the loan does not negate, as a matter of law, the Imler Trust's ability to establish reliance on the Defendants' alleged representations about the purpose for the loan.

7. A future advances clause in the mortgage signed by the Imler Trust did not constitute the Imler Trust's consent permitting First Bank to loan money to America Equities for any and all purposes, but was instead inextricably tied to advances authorized by the underlying promissory note. As such, the future advances clause does not negate, as a matter of law, the Imler Trust's ability to establish reliance on the Defendants' alleged representations about the purpose for the loan.

8. Section 491.010.2, the "Dead Man's Statute," does not bar the admissibility of statements attributable to a deceased person but rather permits their admission under certain circumstances even if they would otherwise be inadmissible hearsay. It follows that the Dead Man's Statute has no application where statements attributable to a deceased person are independently admissible pursuant to an exception to the hearsay rule. Here, the summary judgment record does not establish that statements attributable to Ms. Imler, who is now deceased, will not be admissible at trial as a matter of law, or that no other evidence is available to establish the claims asserted by the Imler Trust.

Opinion by Cynthia L. Martin, Judge

November 25, 2014

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